IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 158

FLEMING SMITH,

Petitioner,

—VS.—

ILLINOIS.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

PETITIONER'S BRIEF

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(a) Opinions Below

The opinion of the Appellate Court of Illinois, reported at 70 Ill. App. 2d 289, 217 N.E. 2d 546, is printed at pages 92 to 96 of the Transcript of Record.

(a) Opinion Below

The opinion and judgment of the Appellate Court of Illinois, affirming the judgment of the Circuit Court of Cook County, Illinois, Criminal Division, were entered on May 9, 1966 (R 92-96). Petition for Leave to Appeal, seasonably filed in the Supreme Court of Illinois on June 30, 1966, was denied, without opinion, on September 22, 1966 (R 97). Petition for writ of certiorari, filed November 7,

1966, was granted on May 15, 1967 (R 99). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

(c) Constitutional Provisions Involved

The Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

The Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

(d) Questions Presented for Review

1. Is the Supreme Court ruling in *Roviaro* v. *United States* that the informer must be disclosed where he is a participant in a sale of narcotics, satisfied by a State procedure which allows the informer to be brought into open court and then refuse to disclose his name?

2. Is the Sixth Amendment right to confrontation of witnesses satisfied by a State procedure which allows a witness to take the stand, accuse the defendant, and then decline to disclose his identity?

(e) Statement of the Case

The State's chief prosecution witness testified that his name was "James Jordan" (R 6). On cross examination, the witness admitted that "James Jordan" was not his

correct name (R 16). When defense counsel asked for the witness's correct name, the prosecutor objected on the ground that the witness did not have to reveal his name for his own safety. The objection was sustained (R 16).

"James Jordan" testified that Fleming Smith sold him narcotics in return for pre-recorded money (R 9). Fleming Smith denied the sale and testified that James Jordan purchased the narcotics from a third party in the restaurant (R 80-81); that he received the pre-recorded money from the cashier in change when he paid for a cup of coffee with a five dollar bill (R 82).

No other prosecution witness observed the alleged transaction (R 52, 60-61).

(f) Summary of Argument

Where a police informant is in fact a material witness on the issue of guilt, the informer's privilege is not available to the State. In the instant case, the informant was a material witness on the issue of guilt. Therefore, the informer's privilege could not be invoked in this case.

Assuming *arguendo* that the State had a valid informer's privilege to invoke, it could not be invoked once the prosecutor had produced the witness in open court to testify against the petitioner. In the instant case, the prosecutor invoked the informer's privilege during trial in order to withhold the chief prosecution witness's correct name. When the prosecutor's objection was sustained, petitioner was thereby effectively denied his Sixth Amendment right to cross examine.

(g) Argument

1. Where the Police Informer Is in Fact a Material Witness on the Issue of Guilt, the "Informer's Privilege" Is Not Available to the State.

There is a vital distinction between a mere informer on the preliminary issue of probable cause and a material witness on the issue of guilt.

A mere informer has a limited role; he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged. His identity is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies.

When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. In such a case, nondisclosure would deprive the defendant of a fair trial. See *People* v. *McShann*, 50 Cal. 2d 802, 330 P. 2d 33, 36, citing *Roviaro* v. *United States*, 353 U.S. 53.

This vital distinction between a mere informer and a material witness was pointed out by Professor Wigmore. Regarding the "informer's privilege" he wrote:

> "That the government has this privilege is well established, and its soundness cannot be questioned." (Footnotes omitted.) 8 Wigmore, Evidence §2374 (McNaughton rev. 1961).

However, Wigmore also pointed out that the privilege is subject to certain limitations inherent in its logic and in its policy. One limitation, which is precisely applicable under the facts of record at bar, is as follows:

> "* * * disclosure will be compelled if the informer is a material witness on the issue of guilt." (Footnote omitted.) 8 Wigmore, Evidence §2374 (4) (McNaughton rev. 1961).

On March 20, 1967, this Court upheld the informer's privilege in a preliminary hearing to determine probable cause for an arrest and search. *McCray* v. *Illinois*, 386 U.S. 300. In *McCray*, the police informer was a "mere informer" on the preliminary issue of probable cause; not a material witness on the issue of guilt. Since he was not present at the commission of the offense charged, he could contribute literally nothing on the issue of guilt. Under such circumstances, this Court held that the privilege against disclosure properly applied.

However, in the case at bar the informant was a material witness on the issue of guilt. He testified that Fleming Smith sold him narcotics in return for pre-recorded money (R 9). Fleming Smith denied the sale and testified that the informant "James Jordan" purchased the narcotics from a third party in the restaurant (R 80-81); that he received the pre-recorded money from the cashier in change when he paid for a cup of coffee with a five dollar bill (R 82). No other prosecution witness observed the alleged transaction (R 52, 60-61). Under those circumstances, we submit that the police informant "James Jordan" was in fact a material witness on the issue of guilt.

Therefore, the "informer's privilege" was simply not available to the State in the instant case.

2. Where the Police Informant Is Called as a Witness to Testify Against the Accused, the Informer's Privilege Cannot Be Asserted to Defeat the Accused's Right to Confront the Witness and Cross Examine Him.

Assuming *arguendo* that the State had a valid informer's privilege to invoke, surely it could not be invoked once the prosecutor had produced the witness in open court to testify against the petitioner.

The Sixth Amendment provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . "

In commenting upon this constitutional guaranty, Professor Wigmore wrote:

> "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross examination, . . . " 5 Wigmore, Evidence §1395 (1) (1940).

Pointer v. *Texas,* 380 U.S. 400, held that the Sixth Amendment right of confrontation is binding upon the States through the Due Process Clause of the Fourteenth; that the right of cross examination must be determined

by the same standards whether the right is denied in a federal or state proceeding.

In *Alford* v. *United States,* 282 U.S. 637, a witness was asked his correct address. The Government's objection was sustained. Your Honors reversed, holding that a witness's correct address was basic to the right of cross examination. Without it, the defendant would be denied the right to seek and offer testimony of the witness's reputation for veracity in his own neighborhood.

In the light of *Pointer* v. *Texas,* the *Alford* case makes the case at bar *a fortiori.*

In the case at bar, the State's chief prosecution witness testified that his name was "James Jordan" (R 6). On cross examination, the witness admitted that "James Jordan" was not his correct name (R 16). When defense counsel asked for the witness's correct name, the prosecutor objected, and his objection was sustained (R 16).

Certainly, there could be no effective cross examination thereafter. A witness's correct name is absolutely essential to meaningful cross examination. Without a witness's correct name, several basic avenues of attack on the witness's credibility are unavailable.

Has the witness been in a mental institution? Does he have a criminal record? Are there charges pending against him? How many? Any investigation into those matters would of necessity begin with the witness's correct name. Without the witness's correct name, all avenues of investigation are sealed off.

It is no answer at all to suggest that counsel could have inquired into those matters of the witness himself. The

point is that counsel could not verify or disprove any answers received; he would have to take the witness's word for it. Counsel would then be in the preposterous position of having to believe a witness whose credibility he is attacking. That would not be cross examination; it would be double direct examination.

In short, we urge that where a witness's correct name is withheld, not only is cross examination restricted, it is effectively denied.

Thus, in the case at bar, the accused was effectively denied his Sixth Amendment right to confront and cross examine his accuser because the State was allowed to interpose the informer's privilege.

(h) Conclusion

In *McCray* v. *Illinois,* this Court quoted with approval the Supreme Court of New Jersey, as follows:

> "We must remember that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege." (386 U.S., at p. 307.)

In the case at bar, we *are* dealing with the trial of the criminal charge itself.

Petitioner prays that the judgments of the courts below be reversed and that this cause be remanded for a new

trial in which his Sixth Amendment right of confrontation will be honored.

Respectfully submitted,

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RECEIVED A COPY of the above and foregoing Petitioner's Brief this 21st day of August, 1967.

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By: /s/ JOHN J. O'TOOLE
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